Supreme Court, U.S.
FILED
APR 20 2000
CLERK

(4) (4)

No. 99-1437, 99-1438

In The

Supreme Court of the United States

NEW YORK STATE DAIRY FOODS, INC., *et al.*,

Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF (No. 99-1438)

JOHN H. VETNE
79 State St.
Newburyport, MA 01950
978-465-3980

JUDITH H. MIZNER*
79 State St.
Newburyport, MA 01950
978-462-0505

*Counsel of Record

April 19, 2000

4044

TABLE OF CONTENTS

I. THE COMPACT COMMISSION'S STATEMENT OF PROCEDURAL HISTORY DOES NOT FAIRLY OR ACCURATELY REFLECT CLAIMS AS PRESENTED BELOW. 2

A. Commerce Clause Claims 2

B. Conflict of Interest Claims 4

II. THE LOWER COURT'S *APPLICATION* OF THE UNMISTAKABLE CLARITY STANDARD FOR CONGRESSIONAL CONSENT TO COMMERCE CLAUSE VIOLATIONS, NOT ITS FAILURE TO ARTICULATE THE STANDARD, FRAMES THE ISSUE. 5

III. THE THIRD CIRCUIT'S *SANI-DAIRY* DECISION STANDS IN SQUARE CONFLICT WITH THE LOWER COURT'S CONCLUSION THAT "PRICING AND POOLING OF MILK" SANITIZES THE COMPACT'S SCHEME OF COMPENSATORY PAYMENT CONCERNS. 6

IV. WHETHER SIGNIFICANT AND DIRECT FINANCIAL INTEREST DISQUALIFIES MEMBERS OF PRICING BOARDS, AS THE HIGHEST COURTS OF MICHIGAN AND NEW HAMPSHIRE HAVE HELD BUT VIRGINIA HAS REJECTED, AND WHETHER A SECOND STAGE "DELEGATION" VOTE IN AGENCY ADJUDICATION CLEANSES THE PROCESS OF PECUNIARY CONFLICT AT THE FIRST STEP, REMAIN SINGIFICANT DUE PROCESS QUESTIONS WHICH ARE UNRESOLVED BY THIS COURT 8

A. Conflict of Interest in Ratemaking..... 8

B. Conflict of Interest in the Agency's Adjudication 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page**

Board of Supervisors v. State Milk Commission, 60 S.E.2d 35 (Va. 1950) 9

Johnson v. Michigan Milk Marketing Board, 295 N.W. 346 (Mich. 1940) 9

Lehigh Valley Cooperative Farmers v. United States, 370 U.S. 76 (1962) 7

New Hampshire Milk Dealers' Association v. New Hampshire Milk Control Board, 107 N.H. 335, 222 A.2d 194 (1966) 9

New York State Dairy Foods v. Northeast Dairy Compact Commission, 198 F.3d 1 (1st Cir. 1999) ..... passim

New York State Dairy Foods v. Northeast Dairy Compact Commission, 26 F.Supp. 2d 249 (D. Mass. 1998) ..... passim

Railroad Comm'n v. Pacific Gas & Electric Co., 302 U.S. 388 (1938) 8

Sani-Dairy v. Espy, 939 F.Supp. 410 (W.D. Pa.), *aff'd, Sani-Dairy v. Yeutter*, 91 F.3d 15 (3rd Cir. 1996) 1, 6-7

West Lynn Creamery v. Healy, 512 U.S. 186 (1994) 7

Statutes and Regulations

United States Code

7 U.S.C. § 7256(7) 2, 6

Dairy Compact Statute

Compact §§ 10(6) and (7) 6

Dairy Compact Regulations

7 C.F.R. § 1301.11(b) 2

7 C.F.R. § 1301.23 2

7 C.F.R. § 1381.4(h)(3) 4

Federal Register

63 Fed. Reg. 65517 (Nov. 27, 1998) 2

Miscellaneous

Northeast Dairy Compact Commission, *Compact Efforts In Other Parts of the Country*..... 1

Southeast Dairy Compact, *Map of Participating Compact States* 1

REPLY BRIEF FOR PETITONERS

The opposition brief of respondent relies on a dissembled and reassembled statement of the principal claims advanced by petitioners to the agency tribunal and federal courts below. As described below, petitioners' focus on the significant Commerce Clause, Conditions of Compact Clause Consent, and conflict of pecuniary interest issues from the very beginning of this controversy is demonstrated by their early "Objections" to the Commission's "Proposed Findings of Fact, Conclusions of Law, and Decision," which is reproduced in the attached Supplemental Appendix ("Supp. App.")[1] As reinforced by the *amicus curiae* brief of United States legislators and dairymen from other parts of the country, respondents' additional dismissal of the Third Circuit's decision in *Sani-Dairy* as presenting no circuit split, where USDA's effort to price and pool a portion of the milk supply of a partially-regulated plant was condemned as an unlawful "compensatory payment," grossly misses the mark since that was the same form of pricing arrangement relied upon by the Commission and approved by the First Circuit.

The questions presented are significant not only to compact agencies and ratemaking boards, but also to the future administration of dairy compact legislation approved by 19 additional states and waiting for Congressional approval.[2]

---

[1] Also included in the Supp. App. are available minutes of the full Commission's consideration of the petitions. Minutes from the September 25, 1997, closed-door executive session deliberation by the full Commission on petitioners' claims were prepared, but not provided by the Commission as part of the administrative record before the lower court. *See* Supp. App. 22-23, 25.

[2] *See* Northeast Compact Commission, *Compact Efforts in Other Parts of the Country* (http://www.dairycompact.org/country.htm) and Southeast Compact, *Map of Participating Compact States*, http://www.agr.state.nc.us/markets/commodit/dairy/map.htm.

I. THE COMPACT COMMISSION'S STATEMENT OF PROCEDURAL HISTORY DOES NOT FAIRLY OR ACCURATELY REFLECT CLAIMS AS PRESENTED BELOW.

A. Commerce Clause Claims (Reply to respondents' brief, pp. 2, 7–12)

As the district court drolly observed, "the beef that generated this suit" is fixed price regulation combined with differential redistribution of pooled compact revenue to dairy farmers based upon location of the receiving plant within or without New England. *New York State Dairy Foods, Inc., v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998); Pet. App. 56. In the example given by the district court for one month, which "the Commission does not dispute," the differential redistribution for one month placed "the New York handler at a $76,000 competitive disadvantage." 26 F. Supp. 2d at 256-57; Pet. App. 54-55. There is no basis for respondents' representation to this Court that the Commerce Clause contentions were "new" when presented to the federal district court,[3] or that the New York processors' "primary challenge" before the agency and

---

[3] Although not precisely before the Court in this case, the Commission gratuitously claims that, under Compact rules, "[a] farmer in New York (outside the region) that supplies a pool [i.e., New England] plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant." This is flatly untrue. Special limitations for any "dairy farmer who produces milk outside of the regulated area" severely limit the ability of out of region farmers to receive the same benefits as their New England peers when their milk is delivered to pool plants (7 C.F.R. 1301.11(b); Pet. App. 192-93). The Commission later limited pooled revenue benefits, uniquely affecting New York farms, when milk is diverted from the pool plant to manufacturing plants near the originating farm, but "located outside of the regulated area." 7 C.F.R. 1301.23 (1998), as amended by 63 Fed. Reg. 65517 (Nov. 27, 1998).

district court was one of Compact statutory construction (Commission Brief at 8, 9-10).

The district court judge correctly perceived that petitioners' "primar[y] challenge" to this discriminatory pricing feature was that it violated the Commerce Clause (Pet. App. 67); but she ultimately concluded that the Commission's scheme for "pricing and pooling of partially regulated plants ... is not precluded by ... Condition 7 of the Congress' consent to the Compact, or the Commerce Clause." Pet. App. 73. The First Circuit Court's decision echoed that petitioners' "...frontal assault on the over-order pricing regime...[is] based on the Commerce Clause..." (*New York State Dairy Foods v. Northeast Dairy Compact Commission*, 198 F. 3d 1 (1st Cir. 1999); Pet. App. 16. Like the agency and district court, the circuit court understood that the Commerce Clause issues turned on "the scope of [Congress'] consent" to the Compact. Pet. App. 18.

These issues also framed petitioners' claims before the Commission. The Commission panel answered the adjudicatory petition and supporting affidavits with a "Proposed Findings of Fact, Conclusions of Law, and Decision" as its only responsive pleading. Petitioners promptly filed their Objections (Supp. App. 1), which focused on the differential redistribution of compact producer prices as the factual basis for their claims (Supp. App. 6-7, 19-20) and which contained the same uncontested example of "competitive disadvantage" adoped by the district court. Applying the law to these facts, petitioners plainly asserted that Congress' proscription against any "limit" on out-of-region milk preserved application of the Dormant Commerce Clause to interregional milk commerce (Supp. App. 9-11) because Congress did not unmistakably permit creation of a competitive disadvantage of this type (or of any type). Indeed, petitioners' conclusions summarized that their claims were simply that Congress did not immunize the Commission

pricing rules' extraterritorial reach from the Commerce Clause or from competitive discrimination scrutiny (Supp. App. 17-18).

B. Conflict of Interest Claims (Reply to respondents' brief, pp. 8, 24).

The New York processors' original adjudicatory petition to the Commission made several specific requests designed to insulate the adjudication process from influence or participation by the Commission's financially-interested farmers and processors. After the Commission panel denied each of these requests (Pet. App. 143-45), petitioners submitted Objections which expressly cautioned that the Commission's "producers or processors ... have a direct pecuniary interest in the outcome [and] should be disqualified from voting on an over-order price *or other quasi-adjudicatory matters*" (Supp. App. 4-5, emphasis supplied).

It was in this context that only a week later the full Commission, with unrestricted participation of its farmer and processor members, convened in executive session to deliberate on petitioners' claims and then unanimously voted to deny petitioners' claims (Minutes of Sept. 25, 1997, Supp. App. 22-23). Notwithstanding the Commission's own requirement that a Commission member "*shall*... disqualify himself or herself from consideration of the Commission's final ruling on the panel's decision if that commissioner's impartiality might reasonably be questioned" (7 C.F.R. 1381.4(h)(3), emphasis supplied), no farmer or processor was recused from deliberations or the final vote.[4]

---

[4] In a subsequent decision on Elmurst Dairy's petition, one dairy farmer and one processor member recused themselves from the final vote, but it is unclear whether they participated, along with non-recused farmers and processors, in the executive session deliberations. Supp. App. at 24-25.

It was also in this context that the district court concluded that the Due Process/conflict of pecuniary interest claims were preserved for federal court review, explaining that the rate-making and adjudication challenges based on conflict of pecuniary interest "conflate." Pet. App. 77, footnote 12. Respondents' suggestion that these issues were somehow waived or "procedurally defaulted" (brief at 19, 24) distorts the administrative record and stretches beyond any reasonable elastic limit the circuit court's later observation that petitioners' due process objections addressed to the Commission did not come packaged in a pleading entitled 'motion to disqualify.' Pet App. 36. Like the district court, the court of appeals proceeded to address the merits of the conflict of pecuniary interest issues in agency adjudication as well as ratemaking, and its unique resolution of the merits frames the question before this Court.

II. THE LOWER COURT'S *APPLICATION* OF THE UNMISTAKABLE CLARITY STANDARD FOR CONGRESSIONAL CONSENT TO COMMERCE CLAUSE VIOLATIONS, NOT ITS FAILURE TO ARTICULATE THE STANDARD, FRAMES THE ISSUE. (Reply to respondents' brief, pp. 13-17)

The Commission artfully evades the heart of the significant Commerce Clause questions raised in the Petitions by recasting the issue as whether "the lower court properly set forth the well-established standard for finding Congressional consent in the Commerce Clause context...." Brief at 14. But in the context of this first conditional Congressional approval of an interstate compact to regulate the marketing and pricing of an agricultural commodity, the specific questions presented have far broader consequence in Commerce Clause jurisprudence.

Carefully omitted from the Commission's brief, and pointedly disregarded in the appeals court's resolution of

Commerce Clause issues, is the condition imposed by Congress that the "Commission shall not ... in any way limit the marketing in the compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7). This clause is the focus of arguments by petitioners that the court below strayed from proper application of the "unmistakable clarity" standard when it based its decision on the words of the Compact rather than the words of Congress. Cumberland Petition at 24; New York State Dairy Foods' Petition at 12-13.[5]

III. THE THIRD CIRCUIT'S *SANI-DAIRY* DECISION STANDS IN SQUARE CONFLICT WITH THE LOWER COURT'S CONCLUSION THAT "PRICING AND POOLING OF MILK" SANITIZES THE COMPACT'S SCHEME OF COMPENSATORY PAYMENT CONCERNS (Reply to respondents' brief, pp.17-19)

Although "compensatory payment" is a term of art which evolved over the course of 50 years under USDA's federal milk pricing program, the court below accepted the Commission's interpretive claim that "pricing and pooling" of a partially regulated plant's milk sales into the regulated market was sufficiently different in form from the method of partial regulation condemned in *Lehigh Valley Cooperative Farmers v. United States*, 370 U.S. 76 (1962), to avoid substantive scrutiny as a "compensatory payment" – the only

---

[5] Although finding unmistakable clarity in the threshold fact of Congress' consent to the Compact, the district court antithetically applied *Chevron* deference to the Commission's interpretation of sections 10(6) and 10(7) of the Compact statute to define the scope of its own authority to burden interregional commerce. Pet. App. 65-66, 71-73. The circuit court did not rely on *Chevron*, but also deferred to the Commission's interpretation and found that Congress prohibited *only one* form of interregional trade barrier which the court believed the Commission had avoided. *Id.* 20-25.

form of trade barrier which the lower court recognized Congress to have prohibited. Pet. App. 24-25.

Just as Commerce Clause analysis requires examination of the practical effect rather than the form, formula or label applied by a state to economic barriers, *West Lynn Creamery v. Healy*, 512 U.S. 186, 114 S. Ct. 2205, 2215-16 (1994), Congress' proscription against compensatory payments is applied by consideration of practical effect. *Lehigh Valley*, 370 U.S. at 83-91. The *Sani-Dairy* court demonstrated allegiance to this principle when it conducted an evidentiary hearing and concluded that the pricing and pooling of milk sold by the partially-regulated handler into the federally-regulated New York market did not insulate the UDSA pricing scheme from compensatory payment analysis (*Sani-Dairy v. Espy*, 939 F.Supp. 410, 413-15 (W.D.Pa), *aff'd* 91 F. 3d 15 (3rd Cir, 1996).

Although the importance of *Sani-Dairy's* partial pooling analysis, and its similarity to the Compact Commission's partial pooling of New York plants, was brought to the attention of the court by appellants' briefs below, the First Circuit chose to deal with the conflict by ignoring *Sani-Dairy*.[6] The Commission now tries to explain the conflict away without acknowledging the partial pooling feature of the federal rule at issue (Commission brief at 17-18). It is this feature which makes the Commission's partial pooling and pricing scheme indistinguishable in substance as well as in form from the compensatory payments condemned in *Sani-Dairy*. The potential of this conflict between the First and Third Circuits to infect the federal milk order program, as further explained in the *amicus curiae* brief filed by midwest dairy farmers, processors, and United States

---

[6] The Commission incorrectly represents to this Court that the First Circuit's decision below addressed *Sani-Dairy* and "found the circumstances presented in that case distinguishable." Commission brief at 17.

legislators, underscores the desirability of this Court's resolution of the conflict.

IV. WHETHER SIGNIFICANT AND DIRECT FINANCIAL INTEREST DISQUALIFIES MEMBERS OF PRICING BOARDS, AS THE HIGHEST COURTS OF MICHIGAN AND NEW HAMPSHIRE HAVE HELD BUT VIRGINIA HAS REJECTED, AND WHETHER A SECOND STAGE "DELEGATION" VOTE IN AGENCY ADJUDICATION CLEANSES THE PROCESS OF PECUNIARY CONFLICT AT THE FIRST STEP, REMAIN SINGIFICANT DUE PROCESS QUESTIONS WHICH ARE UNRESOLVED BY THIS COURT.

We now return to the conflict of pecuniary interest question, to which the Commission devoted much of its procedural reconstruction and most of its argument (brief at 19-24).

A. Conflict of Interest in Ratemaking

The circuit court (Pet. App. 31), and the Commission (brief at 20), ultimately base their conclusions of unchecked dairy farmer and processor participation in decisions to fix the price or rebate they will receive on the notion of "a significantly lower bar" to disqualification from conflict of interest in ratemaking than in adjudication.[7] It is because the level of the ratemaking bar under the Due Process Clause has

---

[7] The Commission observes that "slight" pecuniary interest is not disqualifying in any deliberative context (brief at 20), but does not challenge petitioners' summary of the interest as about $14,700 per year for the average New England farmer, and $34,000 per year or more for the region's larger farms (NY State Dairy Foods' Petition at 7). This case does not require a new definition of "significant" by which to measure pecuniary interest disqualification, since these pricing revenues are "significant" by any measure.

not been clarified by this Court since *Railroad Comm'n v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938) (instructing that "well-settled principles governing the proceedings of rate-making commissions... [require that] the procedure must be consistent with the essentials of a fair trial."), and state courts have come to conflicting conclusions about what standards apply to pecuniary interest conflicts in milk pricing cases, that these issues are clearly proper for certiorari review.[8]

The Commission's spin of the state court decisions unfairly masks the conflict. Petitioners directed this Court's attention to *New Hampshire Milk Dealers' Association v. New Hampshire Milk Control Board*, 107 N.H. 335, 222 A.2d 194 (1966), and brought that case to the Commission's attention in their first brief to the agency tribunal (Supp. App. 2), because of its clear articulation of the principle that milk price ratemaking or adjudication unequivocally requires disqualification of financially-interested decisionmakers. This controlling principle was not somehow diluted, as implied by the Commission (brief at 22), because the state court found in its application that the board member was not possessed of a disqualifying conflict as alleged by the milk dealers.

Johnson v. Michigan Milk Marketing Board, 295 N.W. 346 (Mich. 1940), applied the same standard as the later New Hampshire case, and found that the farmer and processors' participation on pricing matters was constitutionally disqualifying, while the Virginia Court pointedly disagreed with *Johnson* in its tolerance of the kind of "lower bar" advanced by the Commission in this case. *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35 (Va.

---

[8] As emphasized by respondents in their argument heading (brief at 19), most state (and federal) high court decisions relied upon by petitioners are "decades old." If it is simply the case that the conflict bar in procedural due process jurisprudence isn't what it used to be, that alone is sufficient to merit a clear statement by this court on review.

1950). The only "critically different" fact advanced by respondent for Compact Commission proceedings is that its financially-interested members, after deliberating as a group, first vote in state delegations, and the delegations then cast their state votes to produce the final Commission decision (brief at 23). Whether this novel two-step form of voting is sufficient in Constitutional substance to cleanse or attenuate any pecuniary infection influencing the first vote, and may therefore serve as a blueprint for other agencies, is precisely the type of controversy which merits this Court's review.

B. Conflict of Interest in the Agency's Adjudication

The Commission advances only one non-procedural argument to avoid certiorari review of petitioners' claims that participation of farmers and processors in the closed-door deliberations of the full Commission, and in the Commission's vote to deny the relief requested, is incompatible with traditional due process standards. That is, again, the two-step delegation-based voting procedure which, according to the Commission's characterization of the decision below, somehow protected the final result from "the possibility of improper influence by individual members." Commission brief at 24, *citing* the appeals court's decision at Pet. App. 36. On review of this clearly adjudicatory process, the question for this Court is whether the Commission has discovered a Constitutionally permissible tool by which to wedge financially interested persons as qualified participants in matters concerning which they have a substantial pecuniary interest.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

John H. Vetne

Judith H Mizner*

April 18, 1999

*Counsel of Record

SUPPLEMENTAL APPENDIX A

NORTHEAST DAIRY COMPACT COMMISSION

IN RE: PETITIONS OF CROWLEY)
FOODS, etc. (consolidated cases)) Docket No. HEP-97-001

IN RE: PETITION OF MARCUS)
DAIRY) Docket No. HEP-97-003

PETITIONER'S OBJECTIONS TO "PROPOSED FINDINGS, FACT, CONCLUSIONS OF LAW AND DECISION"

Responding to the petitions included in the above caption[1], the Commission's Hearing Panel has issued its "Proposed Findings ... and Decision" which appears to function as an answer to the petitions, as an opposition brief as well as a recommended decision rejecting (without hearing) a number of factual averments, and denying the relief requested by petitioners in all particulars. The combined function of the Hearing Panel's document raises anew the conflicting functions and interests of the Commission and the Commission Hearing Panel.

[1]Additional petitions filed on behalf of Elmhurst Dairy, Inc., and Byrne Dairy, Inc., have been filed, and request has been made that such petitions be consolidated with Crowley Foods, etc.

I. AS INSTRUCTED BY NEW HAMPSHIRE MILK DEALERS ASSOCIATION v. NEW HAMPSHIRE MILK CONTROL BOARD, AND LIKE CASES IN STATE AND FEDERAL CONSTITUTIONAL JURISPRUDENCE, DISQUALIFICATION DUE TO CONFLICT OF INTEREST OR CONFLICT OF FUNCTIONS IS NOT OPTIONAL.

In many matters of constitutional liberty, New Hampshire — the "live free or die" state — often expresses in no-nonsense fashion the common standards to which other federal and state jurisdictions aspire. It is not surprising, moreover, that New Hampshire's has its roots in a controversy involving local milk pricing regulation. In New Hampshire Milk Dealers Association v. Milk Control Board, 107 N.H. 335 (1966), the state Supreme Court relied upon two principles of law which are particularly relevant:

1. Quasi-adjudicatory functions are involved in milk pricing promulgation[2], and
2. Any person with direct pecuniary interest in the outcome of such procedures is constitutionally disqualified.

The law as explained by New Hampshire Milk Dealers continues to guide New Hampshire Courts as shown in Appeal of Hurst, 660 A.2d 1143, 1145 (N.H. 1995)(holding that a personal relationship between administrative staff and litigant before the agency was sufficient to presumptively demonstrate constitutionally impermissible bias).

While the New Hampshire Supreme Court has applied a very practical and more lenient test of disqualification to "public officials occupying administrative positions ... on a part-time

---

[2]Other jurisdictions have similarly recognized that milk pricing regulation involves quasi-adjudicatory elements: "It has previously been held that the promulgation of milk marketing orders by a Commissioner of Agriculture and Markets ... are "judicial" in nature." Western New York Milk Dealers v. Butcher, 551 N.Y.S.2d 623, 625, n. 1 (3d Dept. 1990).

basis," there is no flexibility in the ultimate rule that "a conflict of interest exists [as a matter of law] if an administrative official 'votes on a matter in which he has a direct personal or pecuniary interest.'" State Ex rel Thompson v. Board of Parole, 115 N.H. 414, 1421-22 (1975), quoting Atherton v. Concord, 109 N.H. 164, 165 (1968). See also In re State Aid Highway No. 1, Peru, Vermont, 328 A.2d 667, 670 (Vt. 1974) and Cligham v. Board of Police Commissioners, 613 A.2d 254 (Conn. 1992). These cases simply apply the federal due process requirement which recognizes that some type of interest or stake in a matter is sufficient to disqualify absolutely because the risk of bias is too great to allow rebuttal by assertions of objectivity. Moreover, Thompson instructs that direct "personal" interest may be sufficient to disqualify even if the administrative official or advisor has no direct financial stake in the outcome.

The Commission Hearing Panel, unfortunately, does not directly meet the challenge raised by petitioners. Clearly, as the Panel points out, neither any state constitution nor the federal constitution require disqualification of tribunal members simply because they are interested in the subject matter of regulation. Panel Decision at 24. The authorities relied upon by the Hearing Panel deal with the term "interest" used to mean attention, concern, or curiosity in a manner, which is permissible even if it results in predisposition. "Interest" as used in New Hampshire Milk Dealers or Gibson means legal or financial stake, which is impermissible even though it does not result in actual bias or predisposition. The Panel fails to deal with Commission member "interest" of this type.[3]

---

[3]Petitioners do not necessarily seek to invalidate the Compact statute, as the Hearing Panel erroneously assumes (Panel Decision at 24). Since statutes are to be construed in a manner which will avoid constitutional infirmity, if at all possible, the apparent infirmity in application may be cured by a different application without vitiating the statute.

For purposes of identifying a presumptively disqualifying attribute of Commission members, labels purporting to identify "representative affiliation" of Commission members (Hearing Panel Decision at 2-3, 24), do little more than establish that 13 of 26 Commission members are producers or processors, and therefore have a direct pecuniary interest in the outcome, should be disqualified from voting on an over-order price or other quasi-adjudicatory matters.

The other labels such as "consumer representative" do not reveal the existence or absence of a conflict of interest, because the Compact statute neither requires the "consumer representative" to be a consumer advocate, nor establishes any standards for the representative capacity of non-producer and non-processor members. Nor, unfortunately, is there any requirement for public disclosure of "interest" by such members, where that word means legal or financial stake. As a result, so-called "consumer representatives" may include Robert Starr, one of the most effective legislative champions of Compact over-order pricing, and Chairman Wiers, who is also Chairman of the Maine Milk Commission.

The Hearing Panel's recommended decision concerning its own potential disqualification, and potential disqualification of agency staff for advisor, is equally cavalier. The Hearing Panel consists of Commission members who participated in the establishment of the contested over-order price, and are now being asked to judge the lawfulness of their own decision. The Compact statute (§ 16(B)) does not require the direct adjudicatory involvement of persons contributing to price promulgation any more than the United States Secretary of Agriculture is involved in comparable review proceedings pursuant to 7 U.S.D. § 608c(15)(A). The U.S. Secretary of Agriculture, wisely, has selected a non-involved administrative law judge and judicial officer to adjudicate handler complaints in the name of the Secretary. The Northeast Compact Commission,

unfortunately, eschewed this approach.[4]

As to participation of agency staff in the adjudication process, the Panel's decision is particularly disturbing. Some members of the agency staff have an extraordinarily personal investment in the Compact, and in maintaining over-order producer prices as high as possible as a result of many years of representing producer organizations, and relying on producer-paid salaries to secure Compact legislation.

The law does not impose exclusively upon petitioners the obligation to discover and raise undisclosed facts showing bias. Rather, those who are involved in the decision making process are expected to exercise self-discipline and disclose personal and pecuniary interests of a nature which may compel disqualification. This remains to be done by the Hearing Panel and its advisors in this case.

II. COMMENTS AND OBJECTIONS ON THE HEARING PANEL'S "FINDINGS OF FACT."

The Hearing Panel's findings of fact, like the Commission's pricing decision, reflect an inclination to assemble (and, as necessary disregard) facts to produce a desired result, rather than to examine factual material to determine the appropriate result.

Petitioners take no serious exception to the Panel's initial findings as it relates to petitioners. Petitioners and the Hearing Panel begin to part factual company, however, in paragraph 7 (Crowley findings), in which the Panel describes the make-up of the Commission. While the members of the Commission

---

[4]The Panel suggest that it may avoid APA requirements because it "has chosen not to apply any APA provisions ..." Proposed Decision at 26. Since the APA is simply a codification of procedural mandates expressed by Courts, the Commission may not so easily escape the APA's underlying requirements.

designated as dairy farmers or dairy processors are not disputed, the Panel's designation of members as "consumer representatives" or other "representative affiliations" do not necessarily indicate any true affiliation or actual representation, because no affiliation standards are established by the Compact or the individual states. To petitioners' knowledge, none of the so-called consumer representatives are in any way affiliated with any consumer advocacy group, and some consumer representatives are, inconsistently, champions of high milk prices or answer to employers or constituents who are champions of high milk prices. In any event, apart from identifying dairy farmers and processors, the Commission's identification of so-called "representative affiliation" is substantively meaningless.

In an extraordinarily novel application of the law of evidence, the Hearing Panel declared "irrelevant and immaterial" allegations which tend to undermine the factual integrity of the result reached by the Commission. Panel Findings, p. 4, par. 10. The Hearing Panel refers to the Commission's decision that it "was persuaded" to base the over-order price on application of a consumer price index inflation adjustment factor applied to 1991 milk prices. However, while the CPI arithmetic was undoubtedly correct, there was absolutely no evidence before the Commission of a significant correlation between the Consumer Price Index and dairy farm milk production costs. On the contrary, every credible source of long-term production costs upon which the Commission relied — Springfield Farm Credit, University of Vermont, Cornell University, USDA, and others — reveal a pattern of milk production costs which bear a close relationship to milk prices, and no relationship to consumer prices.

The Hearing Panel erroneously characterizes the final Compact Commission rule as establishing an "over-order price of $16.94 per hundredweight." The Commission's final rule is, instead, designed to create an entry fee ($3.00 for July milk), rather than

a minimum producer price. Whether the Class I milk distributed in New England comes from Albany, New York, or Los Angeles, California, whether the price paid was $13.94 or $19.94, the July fee of $3.00 per hundredweight must be paid to the Compact Commission. The rule does not allow for any adjustment based on regulated or negotiated payments in excess of the New England zone price at the plant of origin. In proposed finding paragraph 24, the Hearing Panel states: "Under the Compact over-order price regulation, all pool plants and partially regulated plants are subject to an identical over-order price obligation, and receive identical over-order credit from the pool." This statement is inaccurate or misleading.

While the over-order Class I surcharge may be the same to similarly situated processors on each side of the New York/New England line, the distribution of producer prices or "over-order credit from the pool" is extraordinarily imbalanced, and designed to create competitive advantage for New England processors both in procurement and in distribution of milk, as shown below.[5]

In the New York milkshed, Compact-funded premiums have caused competitive prices paid by New York plants to increase in order to avoid loss of milk supplies. See Affidavit of Gary

---

[5]For processing 10 million lbs./mo. Plants on either side of the New York/New England line with 80% Class I use, and equal distribution in New England and New York, payments to the Commission would be identical ($124,000), but credits from the pool would be $300,000 for the New England plant and only $62,000 for the New York plant. This is the true measure of competitive inequity created by Compact rules. This illustration assumes, to compare apples to apples, plants of same size, utilization, and distribution in the New England and New York markets. There are in fact New England-based plants, which are or have been regulated as New York-New Jersey pool plants by virtue of majority distribution in the New York market. There is likewise at least one New York based plant (Cumberland Farms) which has a substantial volume of its distribution in New England.

Dake, attached. For New England-based plants, Compact-funded producer prices have created the opportunity for reduction or elimination of competitive premiums, because the Compact producer price permits such plants to outpay their New York competitors. Thus, New England processors with distribution into New York, on which no Compact Commission over-order Class I price applies, are able to sell milk at a substantial raw milk price advantage over their New York competitors who must pay competitive premiums resulting from the competitive distortion of Compact pay-out to New York producers.

Similarly, as a direct result of Compact over-order price regulation, New York processors are placed at a competitive disadvantage not only in milk procurement, but also in distribution of packaged products, both in New York and in New England, due to higher raw product costs.

The Hearing Panel's failure to address the carefully-designed inequity in the Commission's over-order price regulations, or the economic reality of competitive distortions created by Compact pricing, reinforces petitioners' genuine concerns about conflicts of interest and conflicts of functions within the Commission and its staff.

III. COMMENTS ON PROPOSED "CONCLUSIONS OF LAW."

A. The Commerce Clause

The Commission Hearing Panel asserts, and petitioners do not dispute, that Congress may exempt states from the limitations of the Commerce Clause of the United States Constitution. And as transactions within New England, there is little question that Congress has done so.

However, Congressional consent to Commerce Clause immunity

is something which the United States Supreme Court has declared must be unambiguous. Such consent must be found reluctantly and construed narrowly.

Any Congressional exemption from the limitations of the Commerce Clause must be "unmistakably clear." United Egg Producers v. Department of Agriculture, 77 F.3d 567, 570 (1st Cir. 1996). If the requisite clarity does not appear in the text of federal legislation, it cannot be supplied by legislative history. C&A Carbone, Inc. v. Town of Clarkstown, N.Y., ___ U.S. ___, 114 S.Ct. 1677, 1692 (O'Connor, concurring).

The Supreme Court explained the reason for this requirement of express clarity in South- Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 92, 104 S.Ct. 2237, 2242-2243 (1984):

> The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." [citation omitted] Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." [citations omitted] On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

See also, e.g., Maine v. Taylor, 477 U.S. 131, 139 (1986)

(rejecting argument that Lacey Act Amendments, making it a federal crime to transport in interstate commerce any fish transported in violation of any law or regulation from any state, exempted Maine wildlife legislation from scrutiny under the Commerce Clause or lowered the intensity of scrutiny that would otherwise be applied); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456 (1982)(rejecting argument that by approving a number of interstate compacts dealing with water rights and enacting 37 different statutes deferring to state water law, Congress had authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water). Here, as set forth below, the Congressional consent makes it clear that there is no exemption from the Commerce Clause for the extra-regional actions challenged by petitioners.

The Congressional "consent" to the Compact, in its broadest restrictive condition, limits the Commission's authority by providing that it "shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7). This is, essentially, a restatement of the limitations of the negative Commerce Clause applied to the relationship between New England and the rest of the country.

The term "prohibit" in the phrase "prohibit or in any way limit" has been construed in the context of a federal marketing order "compensatory payments" to include economic trade barriers as well as physical restrictions. Lehigh Valley, supra, 370 U.S. at 97; Sani-Dairy v. Yeutter, supra, 939 F.Supp. 410, 413, aff'd, 91 F.3d at 15, 16 (3rd Cir. 1996). The Congressional prohibition against trade barriers as applied to Compact Commission pricing is far more restrictive than the prohibitions limiting similar pricing actions of the United States Secretary of Agriculture in respect to federal orders. The "in any way limit" language addressed by the Supreme Court in Lehigh applied only to milk products and not milk; only the term "prohibit" applied to milk. See Lehigh, supra, 370 U.S. at 97. Here, both terms plainly

apply to both milk products and milk; and, beyond cavil, the erection of a tariff or equalization payment at the New England border to protect the $3.00 Compact over-order price has the impermissible effect of limiting out-of-region milk sold within New England, particularly when combined with unequal distribution of Compact premiums to New York producers. This language essentially paraphrases the proscriptions of the dormant Commerce Clause in describing the commercial relationship which Congress expected to exist between the "Compact Region" and the rest of the country.

Section 147 of the FAIRA, 7 U.S., § 7256, the legislative provision constituting congressional consent to the Compact, also prohibits the use of compensatory payments in any form or for any purpose. Since the obligations which the Commission seeks to impose on plaintiffs can only be viewed as compensatory payments (see discussion, pp. 14-17, infra), they are prohibited by the terms of the Congressional consent to the Compact. As the Supreme Court stated in Cuyler v. Adams, 449 U.S. 433, 438-440, 101 S.Ct. 703, 706-707 (1981):

> The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, provides that 'No state shall, without the Consent of the Congress ... enter into any Agreement or Compact with another State...." Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question. [citations omitted]. .... The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of

federal authority.

See also Pievsky v. Ridge, 98 F.3d 730, 733 (3rd Cir. 1996). Thus, the scope of any Congressional consent must be strictly limited to the terms expressed by Congress. "The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." Petty v. Tennessee-Missouri Bridge Com., 359 U.S. 275, 182-282 (1959).

In interpreting the permissible scope of the compact at issue here and the validity of the rules and pricing regulations promulgated pursuant to it, this Court must examine both the language of the compact and the language of the congressional approval of the compact.[6] That examination demonstrates that those terms do not authorize the regulations challenged here. As the Supreme Court stated in Ardestani v. I.N.S., 112 S.Ct. 515, 520, 502 U.S. 129, 135-136 (U.S. 1991):

> The "strong presumption" that the plain language of the statute expressed congressional intent is rebutted only in "rare and exceptional circumstance," [citation omitted] when a contrary legislative intent is clearly expressed. [citations omitted] In this case, the legislative history cannot overcome the strong presumption "that the legislative purpose is expressed by the ordinary meaning of the words used.'" [citation omitted][7]

---

[6]As the Court stated in Texas v. New Mexico, 482 U.S. 124, 107 S.Ct. 2279, 2283 (1987): "... a compact when approved by Congress becomes a law of the United States, but '[a] Compact is, after all, a contract.' [citation omitted] It remains a legal document that must be construed and applied in accordance with its terms [citation omitted]."

[7]There was no discussion of § 147 of the Farm Bill, beyond setting forth its terms, in the Conference Committee report. Since neither the House nor Senate versions of what became the 1996 Farm Bill contained a provision relating to the Northeast Dairy Compact at all, the House report contains no clarifying analysis. The comments on the floor of Congress during final passage of the Farm Bill are not sufficient to show

See also Connecticut Nat. Bank v. Germain, ___ U.S. ___, 112, S.Ct. 1146, 1149 (1992)("... in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

B. The Hearing Panel's Description of Compact §§ 9(D) and 10(7) as Alternative Means of Regulation Strives to Evade Rather than Apply Conditions and Proscriptions Expressed by Congress.

Recognizing that the Commission was unequivocally prohibited from using compensatory payments of any type, the Commission and its Hearing Panel understandably avoid reliance on § 10(7) of the Compact to justify charges on milk brought into the regulated area. The Hearing Panel emphasizes that out-of-region plants are simply required to pay the same price as fully-regulated New England plants. Panel Findings at 16. This seems to be precisely what the compensatory payment prohibition of Congress, intended to avoid.

With respect to Class I milk brought into the regulated area from outside the region the Compact authorizes the Commission to adopt ...

> Provisions requiring persons who bring Class I milk into the regulated area to make compensatory payments with respect to all such milk to the extent necessary to equalize the cost of milk purchased by handlers subject to a compact over-order price....

MGLA c. 94A App., Art. IV, § 1-10(6), Pl. App. 30, emphasis supplied.

---

intent contrary to the terms of the Compact itself.

While the term "compensatory payment" is not specifically defined in the Compact, the Compact provides that terms associated with market order regulation are to be defined by the industry understanding of those terms (Compact, Art. II, § 3(b); MGLA c. 94A App., Art. II, § 1-3(b), Pl. App. 27.

As used in the federal Milk Marketing Order program, a compensatory payment may have a variety of forms and functions, but the general purpose is to protect those producers and handlers regulated under the pricing and pooling provisions of milk market regulations. This is accomplished by an assessment, partial regulation, or other effective tariff on outside milk to protect the local regulated price from being undercut by the importation of lower cost outside milk. See Conover Affidavit, Pars. 13-15, Pl. App. 5-6, and USDA's 24-market rulemaking decision of July 1964, dealing with a variety of compensatory payment provisions. Pl. App. 94-132. As described in the Report to the Secretary of Agriculture by the Federal Milk Order Study Committee (USDA, 1962)(sometimes referred to as the "Nourse Report," so named after the committee chairman, Dr. Edwin G. Nourse), "compensatory payments" may be charged to a partially-regulated processor on distribution within the regulated area, or to fully regulated processors for bulk milk received from outside sources (Pl. App. 83-94). Such payments, as described in Compact Section 10(6), are designed to equalize costs and prevent undercutting where regulated milk prices are significantly out of line with alternative competitive prices or with outside regulated prices.

Compensatory payments are based on the difference between a regulated price in the protected market, and milk prices paid or assumed to be paid for outside milk by some other measure, and may take many forms. They may be structured, for example, as the difference between the regulated price within a protected market and any of the following: (i) the surplus or Class III price, (ii) the local market blend price, (iii) the origin market blend

price, (iv) the actual cost of milk in the origin market, (v) the regulated price in the origin market, (vi) the price which would have been paid if the handler were fully regulated, or (vii) other measures described exhaustively in the Nourse Report, pp. 68-74, Pl. App. 87-93. As noted in the Nourse Report, "Compensatory payment, in essence, may be described as price barriers in lieu of any more precisely descriptive term." P. 73, n. 9, Pl. App. 92.

Although the petitioners' supporting Appendix of documents contains comprehensive references to the meaning and use of "compensatory payment" in the Federal Milk Marketing Order and judicial context, and hundreds of other resources are available to the Compact Commission, the Hearing Panel relies on nothing more than ipse dixit to assert that there is a distinction between price regulation of partially regulated plants, and equalization charges to a person bringing milk into the regulated area. Panel Decision at 16. There is no such distinction.

Rather, in the Federal Milk Order context, "compensatory payments" is simply the term of art applied to payments made by a partially regulated plant; it is the manner in which partially regulated plants are regulated. For example, the Middle Atlantic Marketing Order defines "partially regulated distributing plant" in much the same way as partially regulated plant is defined by Compact § 2(7):

> (c) "Partially regulated distributing plant" means a plant which is not a pool plant, a producer-handler plant, an other order plant, or the plant of a handler pursuant to §1004.9(e), from which fluid milk products in consumer-type packages or dispenser units are disposed of as route disposition in the marketing area during the month.

7 C.F.R. § 1004.8. Compensatory payments at the difference between the blend price and the Class I price are required, adjusted for plant location. Id. § 1004.76. "Compensatory

payment," although appearing nowhere in the text of the Code of Federal Regulations, is simply the name given to pool payments by partially regulated plants by a formula which is almost universal in the Federal Milk Order System.[8] Petitioners' App., pp. 83-132. This is not simply a matter of distinction with a subtle difference as expressed by the Panel (Findings at 16). It is a partial regulation distinction without difference, and the change to "partially regulated" plants in this case is no less a "compensatory payment" simply because the Commission has chosen another label.

C. Out-of-Region Compact Premium Payments.

As described above, perhaps the most disruptive impact of Compact Commission regulation, as applied, is distribution of variable premiums to producers in New York, while premiums within New England are uniform as to all producers. Again, recognizing that the plain language of the only Compact provision dealing with a Compact over-order price equalization pool would not permit this kind of competitive disruption, the Hearing Panel's recommended decision seeks to stretch and bend other provisions of the Compact to fit the desired result.[9] Federal and state milk regulation have long recognized two methods of distributing minimum price proceeds to producers:

---

[8] See partially regulated definitions, and pool payment obligations described in the following Orders: Upper Florida, 7 C.F.R. 1006.8, 1006.76; Southeast, 1007.8 and 1007.76; and definitions and obligations described in §§ 8 and 76 of most other Federal Order Markets in the three volumes of the Code of Federal Regulations from 7 C.F.R. Part 1000 to 7 C.F.R. Part 1199.

[9] The Hearing Panel expressly disavows the notion that its producer-settlement fund is an equalization pool within the meaning of § 10(5) of the Compact. The Panel does not, unfortunately, point to express language for the type of pool it has created other than pointing to a number of sections which might fit the bill in the eyes of some beholders.

> (1) direct payment by a processor of minimum prices to the supplying producer or cooperative association based on plant use, sometimes called "individual handler pool"
> (2) payments to or through an equalization pool so that all producers receive a uniform price irrespective of handler use.

In language very similar to Compact § 10(5) the Agricultural Marketing Agreement Act also provides for both options. 7 U.S.C. § 608c(5)(B).

Although the Compact Commission has undeniably established in 7 C.F.R. § 1307.1 "one equalization pool" for redistribution of Compact over-order price revenues, the Commission Panel has yet to identify any provision of the Compact which authorizes an Orwellian result which is nearly the opposite of the pool described in § 10(5)(A).

CONCLUSIONS

Petitioners' claims are relatively simple. Congress did not extend its Commerce Clause immunity to transactions between New England and the rest of the country. Any doubt whatsoever in this regard, moreover, must be construed in favor of economic unity rather than protectionist immunity. In any event, Congress

did not consent, and cannot consent, to regulatory conduct by the Commission which treats out-of-state processors and the producers which supply them as a disfavored class in order to erect and maintain a home team competitive advantage for New England processors.

Respectfully submitted,
BLODGETT, MAKECHNIE & VETNE

By:_____

John H. Vetne
79 State Street
Newburyport, MA 01950(508)
465-3980

September 19, 1997 Attorneys for Petitioner

SUPPLEMENTAL APPENDIX B

BLODGETT, MAKECHNIE & VETNE
Attorneys at Law

[N*ames and addresses omitted in printing*]

September 21, 1997

(By FAX and 1st. Class Mail)

Rebecca Holden, Docket Clerk
43 State St.
P.O. Box 1058 Montpelier, VT 95601

Re: Administrative Petitions, Crowley Foods, etc., Nos. HEP-97-001, et seq. Notice of Errata

Dear Ms. Holden:

Petitioners recently submitted their Objections to "Proposed Findings of Fact, Conclusions of Law and Decision." I call your attention to page 8, footnote 5, of the Objections. The calculations of competitive disadvantage for the New York Processor, using July 1997 charges and pool credits, are wrong. The corrected numbers should be $128,000 pool credit to the New England plant and $51,200 pool credit to the New York plant, while both pay $120,000 to the pool. The New York plant disadvantage, therefore, is $76,800 for the month.
These corrections are also included in a revision of footnote 5, on the enclosure.

Very truly yours,

John H. Vetne
Attorney for Petitioners

cc: Michael Wiers, by FAX
Sheldon Weiss, Esq.
Bruce Krupke, NYSDFA

BEFORE THE NORTHEAST DAIRY
COMPACT COMMISSION

IN RE: PETITIONS OF CROWLEY)
FOODS, etc. (consolidated cases)) Docket No. HEP-97-001

IN RE: PETITION OF MARCUS)
DAIRY) Docket No. HEP-97-003

ERRATA

Petitioners' Objections to "Proposed Findings of Fact, Conclusions of Law and Decision" is corrected by revising the first sentence [of footnote 5] to read as follows (revisions underlined):

5/ For processing 10 million lbs./mo. during July 1997, plants on either side of the New York/New England line with 80% Class I use, and equal distribution in New England and New York, payments to the Commission would be identical ($120,000), but credits from the pool would be $128,000 for the New England plant and only $51,200 for the New York plant.

Respectfully submitted,

September 21, 1997

John Vetne
Attorney for Petitioners

SUPPLEMENTAL APENDIX C

NORTHEAST DAIRY
COMPACT COMMISSION

43 State Street
Box 1058
Montpelier, Vermont 05601

Daniel Smith, Executive Director

Officers
Michael A. Wiers, Chair P.O.
Mae C. Schmidle, Vice Chair
Mary K. Kassler, Secretary
Powell Cabot, Treasurer

NORTHEAST DAIRY COMPACT COMMISSION
MEETING
Thursday, September 25, 1997 — 9:00 a.m.
Cat N' Fiddle Restaurant — Concord, NH

Commission Members present:

Connecticut: William Brophy, Gabe Moquin (on behalf of Commissioner Ferris), Bob Jacquier, and Mae Schmidle
Maine: Fred Hardy, Thomas Doak and Michael Wiers
Massachusetts: Jim Hines (on behalf of Commissioner Healy), Mary Kelligrew Kassler, and Sam Shields
New Hampshire: Powell Cabot, Debora Erb and Bill Zweigbaum
Rhode Island: Aaron Briggs, John Smith and Ron Newman
Vermont: Andy Dykstra, Harold Howrigan and Robert Starr

Commission staff present: Dan Smith, Executive Director; Tom Lehner, Staff Counsel; and Liz Lasser, Director of Public Information.

MORNING SESSION:

Chair Michael Wiers convened the Compact Commission Meeting at 9:10 a.m.

Public Participation: No members of the public addressed the Commission.

* * * [*omitted matter*] * * *

Reports:

Chair

Mr. Wiers reviewed the hearing petitions that have been filed. He explained that the Crowley et. al. and Marcus Dairy, Inc. petitions are ready for final discussion by the Commission. In the Organic Cow petition, Mr. Wiers said that earlier in the week Organic Cow filed a petition for a protection order so that the hearing scheduled for October 1st has been cancelled and in its place a panel has been convened for October 1st on the protection order. The hearing itself will be rescheduled. Mr. Wiers added there have been two more petitions filed from Byrne and Elmhurst Dairies and that he, in consultation with the Executive Director and Staff Counsel, has elected to consolidate the two petitions into one hearing. The hearing will be before the same Administrative Panel that heard the Crowley and Marcus petitions since the issues are very similar.

* * * [*omitted matter*] * * *

Executive Session

Ms. Schmidle moved that the Commission go into Executive Session at 11:30 a.m. for the purpose of deliberating the petitions of Crowley Foods et al. and Marcus Dairy, Inc. Mr. Shields seconded the motion. Motion passed unanimously.

AFTERNOON SESSION:

Commission reconvened in open session at approximately 3:05 p.m. There was no response to a request for public participation.

Ms. Kelligrew-Kassle moved in In re Petitions of Crowley Foods, Inc., et al., HEP-97-001 "that the Commission adopt the Final Proposed Findings of Fact, Conclusion of Law and Decision of the Hearing Panel, as amended, as the Final Order of the Commission, direct legal counsel to prepare and issue the order and decision, and direct the Chair, on behalf of Commission to sign the order and decision." Ms. Schmidle seconded the motion. The motion was passed unanimously.

Mr. Jacquier moved in In re Marcus Dairy, Inc. HEP-97-003, "that the Commission adopt the Final Proposed Findings of Fact, Conclusion of Law and Decision of the Hearing Panel, as amended, as the Final Order of the Commission, direct legal counsel to prepare and issue the order and decision, and direct the Chair, on behalf of the Commission, to sign the order and decision. Mr. Dykstra seconded the motion. The motion was passed unanimously.

The meeting was adjourned at approximately 3:10 p.m.

Respectfully submitted,

Mary Kelligrew Kassler
Secretary

SUPPLEMENTAL APPENDIX D

NORTHEAST DAIRY COMPACT COMMISSION

43 State Street
Box 1058
Montpelier, Vermont 05601

Daniel Smith, Executive Director

Officers
Michael A. Wiers, Chair P.O.
Mae C. Schmidle, Vice Chair
Mary K. Kassler, Secretary
Powell Cabot, Treasurer

MINUTES OF THE DECEMBER 3, 1997 NORTHEAST DAIRY COMPACT COMMISSION MEETING TUCK LIBRARY - CONCORD, NH

Commission Members present:
Maine: Michael Wiers, Thomas Doak and Fred Hardy
Connecticut: Mae Schmidle and Shirley Ferris
Massachusetts: Jay Healy, Mary K. Kassler, Gordon Cook, Charles Arbing and Sam Shields
New Hampshire: Powell Cabot, Debora Erb and Williiam Zweigbaum
Rhode Island: John Smith, Ron Newman, Aaron Briggs and Al Bettencourt
Vermont: Robert Starr, Jacques Couture, Millicent Rooney and Andy Dykstra

Commission office personnel present: Daniel Smith, Executive Director;Tom Lehner, Staff Counsel; and Becky Holden, Office Manager.

MORNING SESSION:

Meeting called to order by Chair Michael Wiers at 10:15 a.m.

* * * [*omitted matter*] * * *

AFTERNOON SESSION:

* * * [*omitted matter*] * * *

6. Final Decision in HEP97-007 and HEP97-008 (In Re: Petitions of Elmhurst Dairy, Inc. & Byrne Dairy, Inc.

Motion was made by Mae Schmidle to go into Executive Session at 2:20 p.m. to consider Re Petitions of Elmhurst Dairy, Inc. & Byrne Dairy, Inc. (HEP-97-007 and 008). Seconded by Fred Hardy. Motion passed by unanimous vote of the six State delegations.

Returned to Regular Session at 3:05 p.m.

A motion was made by Mary K. Kassler to adopt the Findings of Fact, Conclusions of Law and Decision of the Commission and directing the staff counsel to prepare the final decision for signature by the Chair.

Seconded by John Smith. Motion passed by unanimous vote of the six State delegations; Commissioners Shirley Ferris and Charles Arbing recused themselves from consideration.

A motion was made by Ron Newman to accept the Confidential Minutes of Executive Session of September 25, 1997. Seconded by Sam Shields. Motion passed by unanimous vote of the six State delegations.

* * * [*omitted matter*] * * *

Meeting adjourned at 4:10 p.m.

Respectfully submitted,

Mary K. Kassler
Secretary